FILE COPY

IN THE

Supreme Court of the United States

No. 697.

October Term, 1947.

HARRY J. ALKER, JR., and MAMIE DuBAN, Individually, and as Executrix of the Estate of ALFRED A. DuBAN, Deceased,
Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent and Appellee Below.

PETITION FOR REHEARING.

EDWIN HALL, 2ND,
A. D. BRUCE,
HARRY J. ALKER, JR.,
1505 Land Title Building,
Philadelphia 10, Penna.,
Counsel for Petitioners.

International, 236 Chestnut St., Phila. 6, Pa.

IN THE

Supreme Court of the United States

No. 697. October Term, 1947

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION

To the Honorable Chief Justice and Associate Justices of the Supreme Court:

On June 18, 1948, your petitioners attempted to file with the Clerk of your Honorable Court a petition for rehearing in the above matter. Petition for certiorari had been denied on May 24, 1948. Your petitioners understood that in accordance with Rule 38 of your Honorable Court they had twenty-five (25) days within which to file a petition for rehearing, your petitioners being unaware of the fact that the Court had modified this rule and that the time was only fifteen (15) days; they having examined their rules in Philadelphia and also made inquiry at the Circuit Court of Appeals in Philadelphia who advised them they had twenty-five days.

Petitioners believe that the Court should permit the petition for rehearing to be filed even though beyond the fifteen-day period. The failure so to do was not intentional, but because they had not received a copy of the amendment and had been misadvised by a clerk of the Circuit Court, and furthermore because your petitioners would have been unable to attach the necessary exhibits and file the petition within the fifteen-day time for the reasons hereinafter stated.

Since filing the petition for certiorari in this matter, your petitioners have been in constant communication with the members of the Banking Committee of both the Senate and the House, who have become greatly interested in this case and feel that the policy which the Court is following in this matter does not truly adhere to the intent of Congress. Therefore, your petitioners have been discussing the matter with the various members of the Banking Committees of both the House and Senate

towards the end that legislation would be introduced to modify Section 264 (s) of the Federal Reserve Act, 12 U.S.C.A. 264 (s). Due to the press of other acts before Congress preceding this, your petitioners were only able to procure the introduction of bills in both Houses on June 9th, which was sixteen days after the petition for certiorari was denied. Therefore within the fifteen-day period it would have been impossible for your petitioners to have attached copies of the Bills which would be necessary for the Court to have before it in connection with the petition for rehearing.

During the discussion of this case by your petitioners with the various members of the Banking Committee of both Houses your petitioners were advised by the members to be sure to keep the matter alive and file whatever petitions were necessary so to do in the event the petition for certiorari then pending would be refused.

Your petitioners therefore submit that the Court should grant leave to file a petition for rehearing even though beyond the fifteen-day period fixed by the present rules of Court because Congress is considering the passing of legislation which would clarify its intentions concerning the policy which the Courts should follow in this matter and the necessary Bills for such legislation were not introduced in both Houses until June 9, 1948, which was after the fifteen-day limit had expired.

Your petitioners therefore pray leave to file the attached petition for rehearing.

Edwin Hall II

EDWIN HALL, II

A. D. BRUCE

HARRY J. ALKER, JR.

Attorneys for Petitioners.

1505 Land Title Bldg.

Philadelphia, Pa.

Harry J Alkers and Mamie Dubas individually and as members of the estate of Angelo A. Dubas dec'd

Harry J Alkers

ORDER

AND NOW, 1948, leave is granted to file the accompanying petition for rehearing of the petitioners' petition for the issuance of a writ of certiorari in the above matter.

BY THE COURT

J.

IN THE

Supreme Court of the United States.

No. 697. Otober Term, 1947.

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Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners Harry J. Alker, Jr., and Mamie DuBan, Individually and as Executrix of the will of Alfred A. DuBan, deceased, pray that this Court rehear and reconsider its denial of the petitioners' petition for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above entitled case, and

RESPECTFULLY REPRESENT:

That on March 25, 1948, your petitioners filed with your Honorable Court a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

The Respondent filed its Brief with your Honorable Court on April 30, 1948.

Your petitioners filed their Reply Brief with your Honorable Court on May 8, 1948.

On May 24, 1948, your Honorable Court refused the certiorari.

The history of the case, questions presented, the statutes and law involved, the specifications of errors and the reasons for granting the writ are set forth in the peti-

tion for certiorari and briefs in support thereof, to which reference is made as well as the record and will not be repeated here.

Reference is also made to the record, the various petitions and the briefs filed in this matter with your Honorable Court as of October Term, 1945, No. 880, which contain further reasons why the writ should be allowed, and are made part hereof by way of reference.

GROUNDS FOR GRANTING THE PETITION.

This is an *equitable* action brought by the Federal Deposit Insurance Corporation to compel the transfer of certain stock belonging to the Estate of Alfred A. DuBan, deceased, and to establish a deficiency judgment against Alker, arising out of Alker's note held by the Integrity Trust Company at Philadelphia, (which company was insured by the Federal Deposit Insurance Corporation). This note was accompanied by certain collateral, part whereof belonging to the DuBan Estate. An oral agreement as to forbearance had been made as to this note by the trust company with Alker and DuBan at the time of deposit in 1931 and was subsequently extended in 1936 to 1946 by the trust company. The Federal Deposit Insurance Corporation after recognizing the agreement for more than two years after it took over the trust company and accepting the benefits of the agreement, suddenly repudiated the agreement and sold all the collateral to itself while Alker was seriously ill in a hospital and Mrs. DuBan, who is blind, was also ill—all at great loss to DuBan and Alker. The District Court decided in favor of the Federal Deposit Insurance Corporation, holding that, although there was no fraud in the transaction, still the agreement was unenforceable because it lacked definiteness as to time—this despite the fact that an offer of proof to establish the certainty and limit of time had been made at the trial but refused by the Trial Judge—all of which will appear by the record. On an appeal to the Circuit Court, the latter

sustained the District Court, brushing aside all other reasons, however, and basing its opinion solely as a matter of law on the decision of your Honorable Court in the case of D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation, 315 U. S. 447, which case was a pure fraud case and bore no resemblance to the case at bar; the Circuit Court specifically referring in its opinion to Sec. 12 B (s) of the Federal Reserve Act, 12 U. S. C. A. 264 (s), which is a statute imposing criminal liability for wilful false statements concerning any matter involving Federal Deposit Insurance Corporation—all this notwithstanding the fact that the record showed that there was no fraud or false statements made and the District Court had so found.

A petition for certiorari from this decision of the Circuit Court was filed with your Honorable Court and refused.

Subsequently a material witness was located and important evidence discovered which was not known to be in existence at the trial. Application was made to the District Court for a new trial. In view of the fact that the Circuit Court had based its opinion on the D'Oench, Duhme case as a matter of law the District Court felt that application should be made to the Circuit Court of Appeals for leave to the District Court to hear the motion for new trial. Upon application to the Circuit Court for such leave to the District Court, the Circuit Court—instead of acting upon the petition, held a hearing, took testimony like a trial court, and refused the motion. This prevented the District Court from hearing the matter.

A petition for certiorari was then filed with your Honorable Court asserting that the Circuit Court had exceeded its authority and that it was a Court of Review and not one to hear testimony. The only reported case in which a Circuit Court was permitted to so act was Hazel-Atlas Co. v. Hartford Co., 322 U. S. 238, which case was exceptional in that there had been perpetrated in that case on that particular Third Circuit Court a fraud. As hereto-

fore stated there was no fraud here either on the District Court or the Circuit Court, and that case could be no justification for such action by the Circuit Court. Your petitioners averred they were denied their right to due process of law by such action of the Circuit Court; and further averred that the Circuit Court had failed to even make a complete record in the matter; a number of the exhibits offered in evidence being missing and were not and are not now before this Court.

The Circuit Court was wrong in the first instance in applying the D'Oench, Duhme decision to this case, and secondly, taking testimony, conducting a trial and deciding the case like a trial court instead of remitting the same to the District Court to hear and decide.

The Circuit Court erred again in ignoring the finding of the District Court that there was no fraud.

The record of the action of the Circuit Court on this hearing filed with your Honorable Court is incomplete as various exhibits filed with it are missing. These missing exhibits must be somewhere in the files of the Circuit Court of Appeals.

As set forth in our petition for certiorari the record clearly showed that this transaction was one that was beneficial to the banking institution and there was no fraud of any kind attached to it. The banking officials admitted there was an agreement. The supplemental record shows that there was a notation of it among the files of the bank and that the bank examiners were advised of the agreement and had agreed with the banking officials that it was advantageous to the bank to make the same. On the original trial some of the records were missing. These were subsequently located and were before the Circuit Court at the time of the hearing. How long the records so produced were in the bank, petitioners could not tell exactly as they had no access to the same. They were there and the record shows they were there at least six weeks and probably a great deal longer. The Circuit Court erred in the opinion

and said six days instead of six weeks. It further held that under the D'Oench, Duhme decision every transaction must in every detail appear on the records of the bank to be binding upon the Federal Deposit Insurance Corporation. The customer of the bank should not be penalized for the failure of the bank to so do as it is impossible for the customer to ascertain or control what the bank does.

However, in this case, a notation plainly appeared on the original notes and another notation appeared on the renewal note as will all appear in the record with your Honorable Court. The record further shows that the bank examiners must have seen the notation as the old notes were there when they suggested that the original notes were stale, being five years or more old, and a new note required and given. The record also shows that petitioners offered proof that the old notes bearing the endorsement were in the possession of the bank for six weeks at least after the execution and delivery of the new note. The record also shows that the bank placed upon the new note the unusual notation that appears on it because of the notation on the original notes, and the agreement relating thereto, so that the new note could be tied up distinctly to the original notes, the notations thereon and the agreement relating thereto. At the time of the trial before the District Court, bankers who appeared as witnesses said the endorsement on the new note was of such an unusual nature that it was notice to every one that an agreement existed as to the note. The record submitted with this petition shows that the former examiner (and the Federal Deposit Insurance Corporation relied upon the examiners entirely) were advised by the bank officials of the existence of an agreement and discussed the same with them several successive years.

It is submitted that had all this been submitted to the District Court for hearing, the District Court could not do other than grant a new trial, all of the evidence being after-discovered and material. Instead, the Circuit Court erred in trying the case and again applying the D'Oench, Duhme decision, thereby depriving the petitioners of an oppor-

tunity to be heard in the proper tribunal and of their right to due process of law.

Petitioners have been advised by various Congressional leaders that Congress never so intended, and never intended the Court to lay down any such public policy against debtors when no fraud or concealment had been practiced against the bank or the Federal Deposit Insurance Corporation. Congress has become alive to this decision and the dangers arising from it, and to permit the decision of the Circuit Court to stand would make the transaction of the usual banking business impossible, and no honest debtor would ever be able to set up a defense of any kind whatsoever against the Federal Deposit Insurance Corporation, if and, when it should decide to sue any one, anywhere in the entire country. These leaders say Congress intended the Federal Deposit Insurance Corporation to be protected where there was fraud, but not where no fraud is concerned. Bills—copies of which are attached hereto and made part hereof—which are made effective as of August 23, 1935—were therefore, because of the Circuit Court's decision in this case, introduced in both the Senate and the House, and are now being considered by the Banking Committees of both Houses. The purpose of these acts is to clarify the original intent of Congress which was that the provision of the Banking Act upon which the Circuit Court relied in this case only should apply to fraud cases, and further that the Federal Deposit Insurance Corporation should occupy no higher position than the insured bank itself as to assets taken over, irrespective of the method adopted by the Federal Deposit Insurance Corporation to secure possession of such assets.

In this case the bank was kept open several days longer than intended in order that the Federal Deposit Insurance Corporation might try to place itself in the position of an innocent holder for value rather than an ordinary assignee (the insurer) taking over assets from the insured bank to secure it for money advanced under the insurance policy.

This was an unfair advantage the Federal Deposit Insurance Corporation attempted to secure, which Congressional leaders say was never intended by Congress.

Furthermore, the Federal Deposit Insurance Corporation in this instance in taking over the assets did not do so for itself alone, but did it for itself and a number of banking institutions which had also made loans to the bank (the Federal Deposit Insurance Corporation acting as liquidator for itself and said banking institutions) which banking institutions had long had representatives on the Board and the Executive Committee of the bank and had approved the bank's agreement relating to the loan which the Federal Deposit Insurance Corporation attempted to repudiate.

It is submitted, therefore, that the petitioners have been denied due process of law, being deprived of the right to have the proper tribunal hear the after-discovered evidence submitted or to be submitted, and because thereof, will suffer irreparable damage, and further, that the Circuit Court erred in applying the D'Oench, Duhme case to this case.

WHEREFORE, it is urged that a rehearing be granted and the order denying the petitioners' petition for a writ of certiorari be reconsidered, and after such reconsideration, the writ of certiorari be granted; or that the Court defer acting upon the same until Congress, whose duty it is to lay down the policy of the law, has a full opportunity to pass upon the said acts and declare its intent inasmuch as the right of these petitioners to the benefits they would otherwise be entitled by reason of said act would be lost—which would be unfair to the petitioners and deprive them of the rights to which they are justly entitled; it having always been the contention of the petitioners that Congress never intended Section 12 B (s) of the Federal Reserve Act, 12 U. S. C. A. 264 (s), (*relied upon by the Circuit Court*) to apply to anything but a fraud case, and further

contending that the D'Oench, Duhme case (also relied upon by the Circuit Court) was never intended to apply to any case where there was no fraud.

The undersigned, the counsel of record for the petitioners, certify that this petition for a rehearing is presented in good faith and not for the purposes of delay.

Respectfully submitted,

EDWIN HALL, 2ND,
A. D. BRUCE,
HARRY J. ALKER, JR.,
Counsel for Petitioners.

We hereby certify that the foregoing petition is presented in good faith and not for delay. The petition is restricted to the grounds specified in the rule of Court as amended.

EDWIN HALL, II
A. D. BRUCE,
HARRY J. ALKER, JR.
Counsel

80TH CONGRESS
2D SESSION

S. 2817

IN THE SENATE OF THE UNITED STATES

JUNE 7 (legislative day, JUNE 1), 1948

Mr. MARTIN introduced the following bill; which was read twice and referred to the Committee on Banking and Currency

A BILL

To amend section 12B of the Federal Reserve Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) subsection (s) of section 12B of the Federal Reserve Act, as amended (U. S. C., title 12, sec. 264 (s)), is amended by inserting before the period a colon and the following: "*Provided,* That nothing herein shall be construed as prohibiting any bona fide transaction between an insured bank and a customer where there is an absence of fraud, and any claim of the Corporation on any note acquired from an insured bank in any capacity whatsoever shall be subject to all defenses available to such bank under the laws

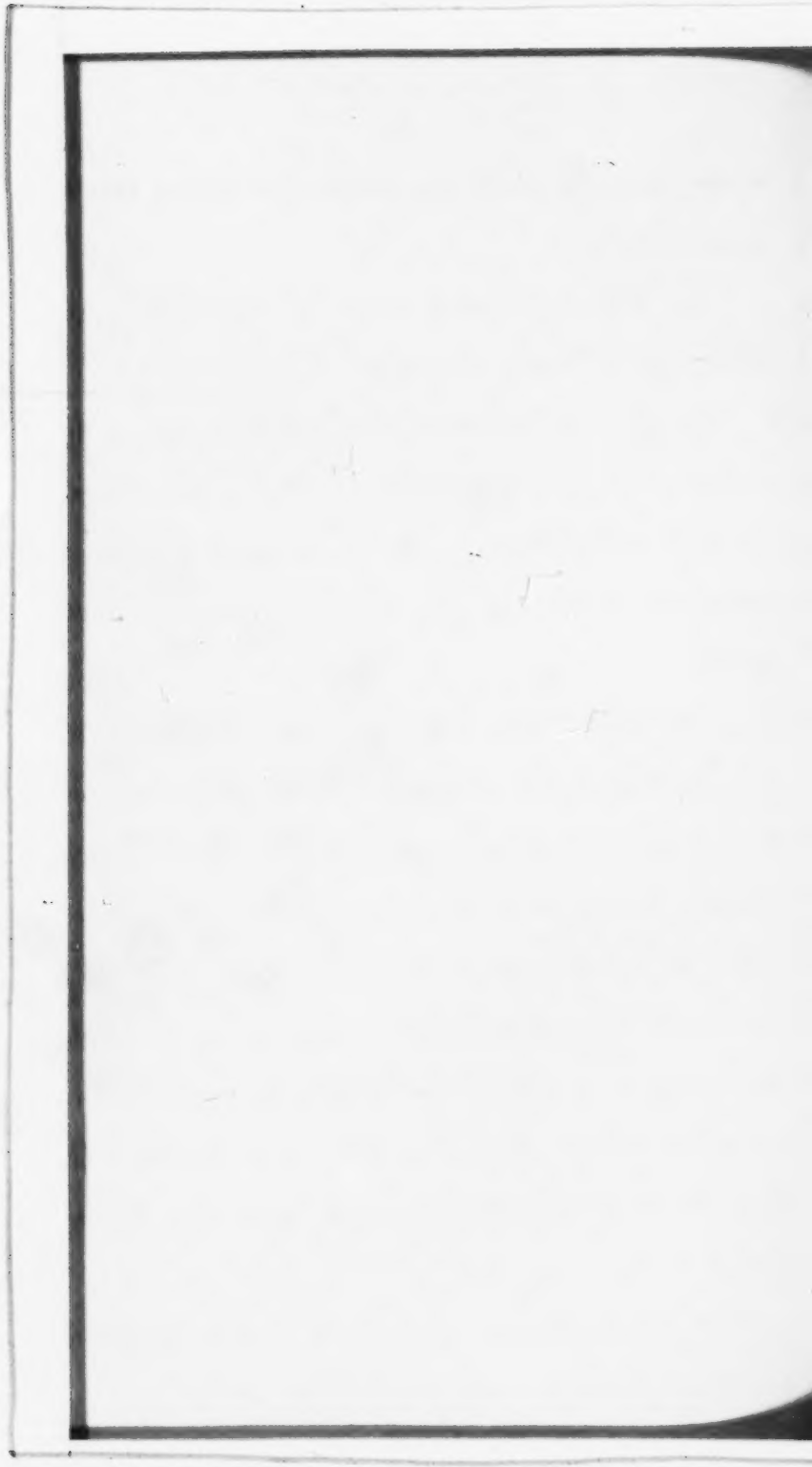
of the State in which the transaction giving rise to such claim occurred".

(b) The amendment made by this section shall be effective as of August 23, 1935.

SEC. 2. (a) Subsection (y) of section 12B of the Federal Reserve Act, as amended (U. S. C., title 12, sec. 264 (y)), is amended by inserting at the beginning of such subsection "(1)" and adding a new paragraph thereto as follows:

"(2) Notwithstanding any other provision of this section, the relationship with respect to all transactions between the corporation and an insured bank is that of insurer and insured. Except in cases of actual fraud, all defenses that might be raised against an insured bank may be raised against the Corporation with respect to any obligation or other property acquired by it directly or indirectly from an insured bank irrespective of the form or method the Corporation may adopt to acquire the same, or to assist the insured bank."

(b) The amendment made by this section shall be effective as of August 23, 1935.



80TH CONGRESS
2D SESSION

H. R. 6853

IN THE HOUSE OF REPRESENTATIVES

JUNE 9, 1948

Mr. MCCONNELL introduced the following bill; which was referred to the Committee on Banking and Currency

A BILL

To amend section 12B of the Federal Reserve Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) subsection (s) of section 12B of the Federal Reserve Act, as amended (U. S. C., title 12, sec.. 264 (s), is amended by inserting before the period a colon and the following: "*Provided*, That nothing herein shalll be construed as prohibiting any bona fide transaction between an insured bank and a customer where there is an absence of fraud, and any claim of the Corporation on any note acquired from an insured bank in any capacity whatsoever shall be subject to all defenses available to such bank under

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(b) The amendment made by this section shall be effective as of August 23, 1935.